IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

COMPANY PETITION No. 197 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ Sd/-

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1.	Whether Reporters of Local Papers may be allowed to see the judgment ?	**YES**
2.	To be referred to the Reporter or not ?	**NO**
3.	Whether their Lordships wish to see the fair copy of the judgment ?	**NO**
4.	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?	**NO**
5.	Whether it is to be circulated to the civil judge ?	**NO**

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SAURASHTRA CEMENT LIMITED - Petitioner
Versus
. - Respondent

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Appearance :
MRS KALPANA K RAVAL for Petitioner.
MS AMEE YAJNIK for Respondent.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 24/12/2007
ORAL JUDGMENT

1. The petitioner, namely, Saurashtra Cement Limited has filed this petition under Section 391 of the Companies Act, 1956 praying for sanction of Scheme of Compromise annexed at Annexure K to the petition so as to be binding on the Scheme Lenders and other concerned of the petitioner Company and on the petitioner Company.

2. The petitioner Company is engaged in the business of manufacturing and production activities of ordinary Portland Cement, Pozzolana Portland Cement, Sulphate Resistant Cement and other brands of Cement at Porbandar. The petitioner Company for the purpose of carrying its Project, borrowed moneys from various Banks, Financial Institutions and other Institutions and issued debentures. Financial Institutions from whom the petitioner Company borrowed monies / issued debentures were IFCI, LIC, GIC, NIC, NIAC & UIIC & OIC & 09 commercial Banks, namely, Central Bank, Dena Bank, Bank of India, Vijaya Bank, Saraswat Co. Op. Bank Limited, SBI International Mauritius, Indusind Bank, Rajkot Nagrik Sahakari Bank & HSH Nordbank (formerly known as L.B. Kiel) & 6 others (UTI, Morgan

Stanley, Bajaj Auto Ltd., Baroda Industries Ltd., Hindustan Construction Company Ltd., and F.L. Smith India.

3. During the year 1997, the petitioner Company took up an Expansion Scheme to be completed in two phases as under :-

Phase – 1

I. Expansion of Cement manufacturing capacity from 1.3 m.t.p.a to 2.4 m.t.p.a by way of modification to Kilns 1 & 3 and addition of up and down stream equipment.

II. Construction of Jetty at Porbandar with facilities for storage and mechanized loading and unloading.

Phase – 2

I. Construction of Jetty at Mumbai with loading, unloading and packing facilities;

II. Acquisition of a self-discharging ship of 5000 DWT.

4. In September 1997, IFCI appraised the project and cost of Phase-1 was estimated at Rs.238.50 crores. Phase-1 was expected to be completed by 1.10.1999. However, the petitioner Company could start effective implementation of the project only from June 1999 as the

financial closure get delayed on account of a hostile takeover attempt which was subsequently withdrawn. The implementation of project was further delayed due to delay in raising funds from the promoters, Fis/Bank, deteriorating of internal accruals for the project etc. The Project could not be completed and had to be stopped mid way since leading lenders i.e. IFCI Ltd., faced liquidity problem and, therefore, did not disburse this already sanctioned loan to the petitioner Company.

5. As a result of the delay in the project and the deterioration in working of the unit, the aforesaid project and financial estimates had to be reviewed. While reviewing the implementation of the project, in May 2002, the project cost of Phase-1 was reassessed at Rs.290 Crores as against the original estimate of Rs.238.50 Crores. As a result of the re-appraisal of the project, the cost of the project has been revised and the funding of the interest as well as repayment has also been reappraised. The petitioner Company has been intending to implement the Project.

6. In the meanwhile, the net worth of the petitioner

Company has been fully eroded and the petitioner Company has become Sick Company as defined under the provisions of Sick Industrial (Special Provisions) Companies Act, 1985. The petitioner Company has filed an application before the Board for Industrial & Financial Reconstruction (BIFR) under the provisions of Section 23 of the Sick Industrial Companies Act, 1985 and is registered with the BIFR on 27.01.2006. Proceeding before the BIFR in pursuance to the filing of the application have been continued. Subsequently, BIFR vide order dated 21.09.2006 declared the Company as a Sick Company.

7. In view of the delay in completion of the project which was due to circumstances which were beyond the control of the petitioner, it has become necessary to restructure the debts of the petitioner Company and wherever possible to arrive at a settlement of such payment. The petitioner Company for restructuring its debts requested the principal lenders to refer the matter to the Corporate Debt Restructuring Cell (CDR Cell) under the CDR System, which has been set up under the guidelines issued by the Reserve Bank of India. CDR Cell vide its

letter dated 26.12.2005 conveyed their final approval to the restructuring package. The petitioner Company states that as per the terms of the CDR Package, it is obliged to restructure its debts in line with CDR sanction. The petitioner Company was, therefore, desirous of affecting the restructuring of the financial terms of the existing loans of the Scheme Lenders in accordance with the terms and conditions of the CDR sanction in the larger interest of Project, the petitioner Company and its stakeholders.

8. The proposed scheme of compromise has been approved by the Board of Directors of the petitioner Company on 31.10.2006. It was resolved in the Board meeting that a meeting of the Scheme Lenders be called to consider the scheme of compromise. Accordingly, the petitioner Company filed Company Application No. 31 of 2007 before this Court seeking, *inter alia*, directions from this Court to convene the meeting of Scheme Lenders for the purpose of considering the scheme of compromise or arrangement under Section 391 & 314 of the Companies Act. This Court vide order dated 01.02.2007 directed, inter alia, the petitioner Company to hold a meeting of

the Scheme Lenders on 06.03.2007. The notice for convening the meeting of the Scheme Lenders was sent to the Scheme Lenders and the meeting was convened on 06.03.2007. However, in the said meeting, the Scheme Lenders were desirous of adjourning the meeting and hence, the meeting was adjourned at the request of the Scheme Lenders.

9. The petitioner Company thereafter filed Company Application No.242 of 2007 seeking direction, *inter alia*, from this Court to once again convene the meeting of Scheme Lenders and this Court vide its order dated 11.05.2007, *inter alia*, directed the petitioner Company to convene the meeting on 29.06.2007. Accordingly, notice for convening the meeting on 29.06.2007 was circulated to all the Scheme Lenders. In the said meeting, while the majority of the Scheme Lenders were in favour of approving the Scheme and modifications to the Scheme were suggested by Dena Bank. IFCI wanted further time to consider the Scheme. As IFCI is the lead Institution and the Monitoring Agency appointed by BIFR, the rest of the Scheme Lenders agreed to the adjournment of the meeting.

10. The petitioner Company thereafter filed another Company Application No. 333 of 2007 before this Court seeking directions from this Court to convene the adjourned meeting of the Scheme Lenders and this Court vide its order dated 16.08.2007 directed the petitioner Company to convene the adjourned meeting on 20.09.2007. By the said order, the petitioner Company was also directed, *inter alia*, to issue advertisement in the Newspapers as well as to send notices to the Scheme Lenders. Shri Jay Mehta failing him Shri R. K. Podar was appointed as the Chairman of the meeting as directed by this Court. The meeting of the Scheme Lenders was convened on 20.09.2007. In the said meeting, 11 authorized representatives of the Scheme Lenders remained present and 6 of them sent their proxies. The Scheme Lenders suggested three modifications / amendments to the Scheme. The Scheme was approved with the suggested 3 amendments by 16 out of 17 Scheme Lenders remaining present and voting which amounts to 99.4% of the total outstanding dues of the Scheme Lenders present and voting. This in turn amounts to approximately 84% of the total outstanding

dues of the Scheme Lenders. The 3 amendments to the Scheme which the Scheme Lenders approved are,

A) The cut-off date should be correctly reflected at all places as 01.07.2005.

B) On page 14 existing para 4 shall be replaced with the new para 4 as follows :-

"The Board of Directors of SCL with the approval / consent of the CDR Empowered Group shall assent from time to time on behalf of all persons concerned to modifications or amendments or additions to the Scheme."

C) On page 18 in the para 5, last line the word "with" to be read as "shall".

11. The Scheme Lenders passed the following Resolution in the meeting.

RESOLUTION FOR APPROVING THE SCHEME BY SCHEME LENDERS OF THE COMPANY

"RESOLVED THAT pursuant to the provision of Sections 391 to 394 of the Companies Act, 1956 and other applicable provisions of the Companies Act, 1956, if any and subject to such sanctions of Hon'ble High Court of Gujarat as may be required in law and subject to such consents and permissions of the Central Government and other authorities as may be necessary, be and hereby

approves the Scheme of Compromise or Arrangement between Saurashtra Cement Limited (SLC) and the Scheme Lenders of the Company to settle their outstanding dues as per the scheme circulated.

RESOLVED FURTHER that this meeting of the Scheme Lenders of the Saurashtra Cement Limited do hereby approve the Scheme of Compromise or Arrangement between Saurashtra Cement Limited and the Scheme Lenders of the Company with above said modification to settle their outstanding dues in Company Application No. 333 of 2007 in Company Application No. 242 of 2007, as circulated along with notice dated 21st August, 2007 and now before the meeting.

RESOLVED FURTHER that Board of Directors and/or the Committee of the Board of Directors for this purpose of the applicant Company, be and is hereby authorised to do all such acts, deeds, matters and things as are considered requisite or necessary to effectively implement the arrangement as embodied in the scheme and to accept such modifications and/or conditions, if any, which may be required and/or imposed by the Hon'ble High Court of Gujarat and/or by any other authority, while sanctioning the compromise or arrangement as embodied in the Scheme."

12. The petitioner Company accordingly produced on record the modified Scheme as approved by the Scheme Lenders on 20.09.2007 and submitted that the scheme of Compromise would be for the benefit of the Company, its members, creditors and also for the public.

13. This Court has issued notice on 25.10.2007 and admitted

the petition. The petitioner Company was directed to publish the advertisement in the English daily '**Indian Express**' and Gujarati daily '**Sandesh**' – both Ahmedabad editions. Publication in the Government Gazette was dispensed with. The Court has also issued notice to the Central Government to be served through the Regional Director, Corporate Affairs, Mumbai.

14. An affidavit is filed by one Mr. Anil N. Vyas, Authorized representative of the petitioner Company on 22.11.2007 stating that pursuant to the order dated 25.10.2007, advertisements were published on 7.11.2007 in **Indian Express** and on 08.11.2007 in **Sandesh**. Copies of the said advertisements are produced on record along with the said affidavit. An affidavit of service was filed by one Mr. Pralhad G. Karkun, constituted Attorney holder of the petitioner Company wherein it is stated that the notice was served on the Regional Director on 07.11.2007.

15. Pursuant to this notice to the Regional Director, an affidavit was filed by Mr. R. K. Dalmia, Deputy Registrar of Companies, Ahmedabad wherein it is stated that as

per paragraph 22 of the petition, 16 lenders out of 17 remained present and approved the Scheme of arrangement. It is further stated that as per para 10 of the petition, BIFR vide order dated 21.09.2006, the petitioner Company has been declared as Sick Company.

16. In the above background of the matter, the petition is taken up for final hearing.

17. Ms. Kalpana R. Raval with Ms. Dharmishtha Raval, learned advocates appearing for the petitioner Company has submitted that pursuant to the order passed by this Court about the advertisement of the petition, no one has raised any objection against the Scheme of compromise and arrangement. They have further submitted that as per Chairman's report, the Scheme has been approved by the requisite majority of the Scheme Lenders who were present and voted in favour of the Scheme. Court's attention was invited to the Chairman's report dated 24.09.2007. It is stated in the report that scrutinizers have submitted their report dated 20.09.2007 and in accordance with the report, the proposed Scheme was approved with the amendment by 94.12% in number and

99.6% in value, of those attended and cast the valid votes. They have further submitted that even the Regional Director has not raised any objection against the proposed Scheme. It is true that out of 17 lenders who remained present, only 16 lenders have approved the Scheme of compromise and arrangement. However, the approval granted by 16 lenders is more than the requisite majority as provided under the provisions of the Act. They have further submitted that even reference to BIFR proceedings and Company's status being sick company would not prevent this Court from passing the order regarding sanction of the Scheme of compromise and arrangement. For this purpose, reliance is placed on the decision of this Court in the case of **Phlox Pharmaceuticals Limited V/s. State of Gujarat** decided on 28.07.2005, and **Anmol Dairy Limited V/s. State of Gujarat**, decided on 07.08.2001. Based on the averments made in the petition, documents produced along with the petition and the aforesaid decisions of this Court, they have strongly urged that the modified scheme is required to be sanctioned.

18.Having heard learned advocates appearing for the

respective parties and having considered the communication filed by the Registrar of Companies and considering the documents on record, the Court is of the view that the Scheme of compromise and arrangement is in the interest of Company and the Scheme Lenders. As regards the BIFR proceedings, this Court has considered the similar objection raised by the Registrar of Companies, Regional Director in the case of **Phlox Pharmaceuticals Limited V/s. State of Gujarat** wherein the transferee Company was a sick Company before BIFR and a scheme of rehabilitation / amalgamation was also pending before BIFR, New Delhi, under SICA. Hence, NOC of BIFR may be required for the proposed scheme. In this case, the Court has considered the submissions made on behalf of the Transferee Company and after following the decision of Bombay High Court in the case of **National Organic Chemical Industries Ltd., V/s. Nocil Employees Union** in Company Petition No. 104 of 2005 with Company Application No. 446 of 2004, the Court has considered the issue as to whether in view of the provisions of Section 32 of SICA, once the reference having been registered under Section 15, whether this

Court is entitled to exercise power under Section 391 to 394 of the Act or by virtue of the overriding effect under Section 32, the provisions of Section 15 to 18 which also provide for preparation and finalisation of the Scheme of the sick industrial Companies would override the provisions of Section 391 to 394 of the Companies Act and after recording the submissions of the learned advocate appearing for the parties to the effect that it is immaterial that the reference is registered under Section 15 of SICA and despite the pendency of the reference, the Court has ample jurisdiction and power to sanction the Scheme under Section 391 to 394 of the Act. The provisions of Section 22 of SICA which, inter alia, provide for suspension of the provisions has no application in as much as the case before the Court was not a suit and, therefore, the Court can proceed under Section 391 to 394 and sanction the scheme. Even the provisions of Section 26 of SICA would not apply because bar of the jurisdiction of the Civil Court is given in a very limited manner and only to the cases where the orders are passed by the BIFR and appeal lies therefrom to the appellate authorities under the said statute. The said bar of jurisdiction applies only in case of appeal and does not

apply to the present proceedings under Section 391 to 394 of the Companies Act. Provisions contained in Section 32 of the Act which has been given an overriding effect applies only to the situation where the provisions of the two statutes are inconsistent with each other and overriding effect is only given to those provisions which are inconsistent with the provisions of SICA. Considering these submissions as well as the decision of the Division Bench of the High Court of Himachal Pradesh in the case of **In re. Gontermann – Pipers (India) Ltd.**, decided on 12.07.2004, this Court has taken the view that the provisions of Section 15 to 19 of the Act contemplate a scheme where a company which has become sick can register itself with the BIFR which is vested with the power under the provisions of the said Act which shall thereafter after making enquiry may provide for package for rehabilitation of the Company and/or make the company viable so that the business of the company can continue. The provisions of Section 391 to 394 of the Company Act, 1956 also similarly provide for rearrangement of the Company's business by way of granting amalgamation, demerger and/or by sanctioning of the scheme of compromise which also has very same

purpose and object to revive and/or make the company more viable and efficient. The provisions of the Act though provide for different methods of doing so, they are not inconsistent with each others. Apart from this, the provisions of SICA operate in a slightly different sphere i.e., the case where the net worth of the company has become negative, whereas the provisions of Section 391 to 394 have no such requirement as condition precedent and this provision can even operate in cases where the companies are doing quite well and are seeking to rearrange their business for the efficient management or better business prospects and thus seek to amalgamate or emerge their business operation. The Court, therefore, took the view that there is no inconsistency between the provisions of Section 32 of the SICA and the provisions of Section 391 and 394 of the companies Act and hence there is no question of provisions of Section 32 of the SICA being made applicable to the said case. The Court, therefore, took the view that the Court has ample power and jurisdiction to grant sanction of the scheme under Section 391 and 394 of the Companies Act, 1956 despite the fact that the transferor company's reference was pending before the

BIFR.

19. Based on the aforesaid decision of this Court, there is no bar to grant sanction to the present Scheme. Accordingly, the Scheme at Annexure K to the petition is hereby sanctioned and the same is declared to be binding on Scheme Lenders of the petitioner Company and also on the petitioner. The petitioner Company shall file with the Registrar of Companies certified copy of this order within 14 days from today.

20. So far as the costs to be paid to the Central Government Counsel is concerned, the same is quantified at Rs.3,500/- which is to be directly paid to Ms. Ami Yagnik, learned Central Government Counsel appearing for the Central Government.

21. The petition is accordingly disposed of.

Sd/-
[K. A. PUJ, J.]

Savariya